IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiff,	)	
	)	**Case No. 4:05-CV-329-GKF-PJC**
v.	)	
	)	
TYSON FOODS, INC., et al.	)	
	)	
Defendants.	)	

CERTAIN DEFENDANTS' JOINT MOTION TO VACATE PARTIAL CONSENT DECREE AND INTEGRATED BRIEF IN SUPPORT (DOC. NO. 2107)

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I. INTRODUCTION

The undersigned non-settling Defendants ("Defendants") respectfully move this Court pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to vacate the Partial Consent Decree ("PCD") (Exhibit 1 to Doc. No. 2038) entered on May 19, 2009 (Doc. No. 2107) between Plaintiff State of Oklahoma and Defendant Willow Brook Foods, Inc. ("Willow Brook"), and to set a process whereby the non-settling parties to this litigation and the public at large can comment upon and/or object to the PCD, as required by CERCLA (the very statute that the Oklahoma Attorney General has invoked to support the PCD), the Oklahoma Contribution Among Tortfeasors Act, OKLA. STAT. tit. 12, § 832 ("CATA"), and the terms of the PCD itself.

While Defendants dispute that Plaintiff has asserted any viable CERCLA claim against any of the Defendants, Plaintiff purports to have brought and now settled a CERCLA case against Willow Brook. Both CERCLA and the CATA provide procedural protections for the Defendants and the public which the Attorney General has attempted, and managed, to avoid in steering the PCD through to final approval by this Court. As discussed hereinafter, there are numerous serious procedural and substantive issues with both the PCD and the process surrounding its submission to the Court, which Defendants, in consideration of due process, good faith, and fundamental fairness, must have the opportunity to submit to this Court, so as to fully inform its consideration of whether or not to enter the PCD. To rectify the numerous defects of the PCD and the circumstances surrounding its submission to this Court, and thereby avoid the manifest injustice which flows from the entry of the PCD as it was presented to the Court by the Attorney General, the Court should vacate the PCD and set a process whereby the PCD may properly be subjected to review and comment by the Defendants and the public as required by law, thus assuring that those who are impacted by the entry of the PCD have a voice in the

matter; and also guaranteeing that the terms of the PCD comport with the necessary legal requirements for such a document and thus warrant this Court's approval. As grounds for this motion, Defendants state the following:

II. BACKGROUND

In this litigation, the State of Oklahoma has asserted claims for cost recovery, natural resource damages, and declaratory relief under CERCLA § 107, 42 U.S.C. § 9607; civil penalties and injunctive relief under the citizen suit provision of RCRA, 42 U.S.C. §§ 6901 *et seq*. and various Oklahoma statutes; and damages (including punitive damages) for common law nuisance, trespass, and unjust enrichment, for alleged environmental injuries relating solely to the Illinois River Watershed ("IRW"). *See generally* Second Amended Complaint (Doc. No. 1215). The State of Oklahoma seeks hundreds of millions of dollars, if not billions, in compensatory and punitive damages plus an unspecified amount for attorney's fees in this case. *See, e.g., Defendants' Joint Motion for Partial Summary Judgment as to Plaintiffs' Time Barred Claims* (Doc. No. 1876), Exhibit 12 (Chapman, David J., et al., *Natural Resource Damages Associated with Aesthetic and Ecosystem Injuries to Oklahoma's Illinois River System and Tenkiller Lake*) and Exhibit 13 (Hanemann, W. Michael, et al., *Natural Resource Damages Associated with Past Aesthetic and Ecosystem Injuries to Oklahoma's Illinois River System and Tenkiller Lake*); http://www.uslaw.com/library/Personal_Injury_Law/Byron_White_Courthouse_DenverOklahoma_Seeks_Injunction_Poultry_Industr.php?item=410349 (reporting that Motley Rice, one of several outside law firms retained by the State for this litigation, has invested $24,000,000.00 in this litigation).

On May 8, 2009, the Attorney General, invoking this Court's jurisdiction pursuant to CERCLA §§ 107 and 113, entered into the PCD with Willow Brook, under which Willow Brook

would pay the State $45,781 in response costs for the IRW, and some portion of $28,906 in natural resource damages.[1] PCD at 9. The Attorney General did not explain in the PCD how the State arrived at either figure, nor did it explain why the sum of $45,781 is justified in light of the State's total claimed damages.[2]

In exchange for a sum that is clearly small in comparison to the State's overall damage claim, the PCD absolves Willow Brook of liability, not only for its claims related to the IRW, but also for similar claims related to any watershed located in whole or in part in Oklahoma:

> the State releases and covenants not [to] sue Willow Brook for recovery of response costs, natural resource damages, injunctive relief, or other remedies sought in the Complaint by the State regarding the release of nutrients and bacteria from the management, storage, land application, and disposal of poultry waste generated at its poultry operations or poultry operations under contract with it in any watershed located in whole or in part in Oklahoma that occurred after December 31, 1998 and prior to the effective date of this Consent Decree. . .

PCD at 14. Further, under the PCD, the Attorney General purports to extend contribution protection under CERCLA § 113(f)(2) not only for claims relating to the IRW (the only Oklahoma watershed at issue in this litigation), but to all "Matters Addressed in this Consent Decree" – defined in the PCD to encompass "any watershed located in whole or in part in Oklahoma . . . " PCD at 5, 16. According to the EPA, there are a total of 67 watersheds in Oklahoma. *See* http://cfpub.epa.gov/surf/state.cfm?statepostal=OK. The PCD purports to relieve Willow Brook from liability for all of these watersheds and to extinguish the contribution

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[1] Some unknown portion of the $28,906 is allocated to the Grand Lake Watershed, which is not at issue in this litigation, but which, nonetheless, the Attorney General included in the PCD. PCD at 2, 5, 9. Under the PCD, Willow Brook also agreed to pay $25,687 in response costs for the Grand Lake Watershed, as well as $16,189 in attorney fees and $3,437 in unidentified expenses. *See* Second Amended Complaint; PCD at 2.

[2] The gross disparity between Willow Brook's settlement amount and the State's claimed damages for the IRW, combined with the failure of the Attorney General to provide any evidence as to how the two correlate, leads to the conclusion that either Willow Brook's settlement is completely unreasonable, or that the State's claimed damages, and their experts on that point, are not at all credible.

rights of these Defendants, other responsible persons under CERCLA, and unknown tortfeasors who may be subject to future litigation relating to those watersheds. The PCD also states that:

> [t]his Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The State reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate.

PCD at 18.

On May 12, 2009, prior to any public notice or the receipt of any comments, the State and Willow Brook moved this Court to enter the PCD. The Attorney General makes no claim that it complied with the notice and comment requirement under CERCLA or the terms of the PCD itself. *See Memorandum in Support of Joint Motion to Enter Consent Decree* (Doc. No. 2038). On May 19, 2009, the Court ordered the entry of the PCD. Since the entry of the PCD, the Attorney General has not informed the Court that the State did not publish the PCD, or that the 30-day public notice and comment period has not yet run.

III. STANDARD OF REVIEW

Rule 59 of the Federal Rules of Civil Procedure authorizes the alteration, amendment, or vacatur of a judgment. FED. R. CIV. P. 59(e). Grounds warranting relief under Rule 59(e) include (1) an intervening change in controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. *Servants of the Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir. 2000); *see also Syntroleum Corp. v. Fletcher International, Ltd.,* No. 08-CV-384-JHP-FHM, 2009 WL 761322 (N.D. Okla. March 19, 2009). "Thus, a motion [under Rule 59(e)] is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Servants,* 204 F.3d at 1012*; see also White v. New Hampshire*

Dept. of Employment Security, 455 U.S. 445, 450 (1982). Here, Rule 59 requires vacation of the PCD because of the Attorney General's failure to adhere to required procedures and to provide the evidentiary support necessary for the PCD's endorsement by this Court.

IV. ARGUMENT

a. The Oklahoma Attorney General Deprived the Defendants and the Public of Procedural and Substantive Rights Relating to the PCD.

From a procedural standpoint, the PCD is completely deficient on a multitude of levels. As an initial matter, the Attorney General erred in invoking CERCLA as a foundation for the PCD. As Defendants definitively demonstrated in their recent summary judgment filings, Plaintiff has failed to establish that the application of poultry litter as a fertilizer in the IRW constitutes a release of a hazardous substance under CERCLA. *See* Doc. Nos. 1872, 1925. Accordingly, invoking CERCLA as the basis for the PCD – and likewise extending purported contribution protection to Willow Brook under CERCLA § 113 – is completely improper.

Moreover, to the extent that the PCD could be construed as proper under CERCLA, the Attorney General has intentionally and completely failed to comply with the detailed procedures set forth in § 122 of CERCLA relating to settlements. With regard to cost recovery settlements under § 122(h), § 122(i) ("Settlement procedures") sets forth a three-step process incorporating publication, a comment period, and consideration of comments before a settlement may become final. CERCLA § 122(i), 42 U.S.C. § 9622(i). Section 122(i) details the requirements for public notice: "[a]t least 30 days before any settlement . . . may become final . . . the head of the department or agency which has jurisdiction over the proposed settlement shall publish in the Federal Register notice of the proposed settlement. The notice shall identify the facility concerned and the parties to the proposed settlement." CERCLA § 122(i), 42 U.S.C. §9622(i)(1). The second step, the "comment period," requires that:

> [f]or a 30-day period beginning on the date of publication of notice under paragraph (1) of a proposed settlement, the head of the department or agency which has jurisdiction over the proposed settlement shall provide an opportunity for persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement.

CERCLA § 122(i)(2), 42 U.S.C. § 9622(i)(2). Finally, the proponent of the settlement is required to "consider any comment filed under paragraph (2) in determining whether or not to consent to the proposed settlement and withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate." CERCLA § 122(i)(2), 42 U.S.C. § 9622(i)(2).

The PCD itself tracks this statutory language. Section XVIII of the PCD, entitled "LODGING AND OPPORTUNITY FOR PUBLIC COMMENT," expressly calls for the PCD to be "lodged with the Court for a period of not less than 30 days for public notice and comment. The State reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate." PCD at p. 18.

Despite the stated requirements of both the PCD and CERCLA, the Attorney General consciously and completely bypassed these required procedural safeguards.[3] It did not make the PCD public, and provided neither the Defendants nor the public an opportunity for comment.

[3] Plaintiff may argue that § 122(i) applies only to settlements with the United States; however, because the Attorney General specifically invoked CERCLA as the basis for the PCD, and has extended extraordinarily broad contribution protection to Willow Brook on the same basis (thereby depriving Defendants of their statutory contribution rights), and because the Attorney General also represented to the Court in the PCD that it would employ the public notice and comment process, it should not be permitted to evade this critical step in obtaining approval of the PCD. Further, courts have recognized that an extension of CERCLA's contribution protection, without the correlative statutory safeguard of public notice and comment, implicates due process concerns. *See, e.g, Kelley v. Wagner*, 930 F. Supp. 293, 298 (E.D. Mich. 1996) (enactment of CERCLA's notice-and-comment provision, 42 U.S.C. § 9622(a), reveals Congress' perceived need for procedural due process with regard to settlement agreements; the requirement for procedural due process was satisfied where the consent decree was submitted to the court for review and objector was given an opportunity to be heard "at a meaningful time and in a meaningful manner," citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

Disregarding the required procedure, it instead moved immediately to have the Court enter the PCD, without ever informing the Court that it had not complied with the necessary process. Further, once the Court did enter the PCD on May 19, 2009, the Attorney General took no steps to inform the Court that the PCD had not been published, that comments had not been taken from the public, or, indeed, that the claimed 30-day notice and comment period had not yet run. If the State's claims do properly fall within the scope of CERCLA, then the Attorney General, in completely disregarding the notice-and-comment requirements of CERCLA and the PCD, failed to comply with its legal obligations. *See* CERCLA § 113(i); PCD at 18. If this is not a CERCLA case (as Defendants contend), then the PCD – purporting to release Willow Brook from liability and extending contribution protection to it pursuant to that statute – is completely improper. Under either scenario, it is patently clear that the PCD, as it stands, should be vacated, and that any future consent decree, and the Attorney General's procedures for submitting such a decree for approval by this Court, warrant the closest scrutiny.

Assuming, for purposes of argument, that the PCD is appropriate under CERCLA, a district court, in approving a consent decree, must determine that the decree is fair, reasonable, and faithful to the purposes that CERCLA is intended to serve. *U.S. v. Cannons Engineering Corp.*, 899 F.2d 79, 84 (1st Cir. 1990); *see also* H.R. REP. NO. 253, Pt. 3, 99th Cong. 1st Sess. 19 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3042. "[T]he approval process is more than a mere formality. The Court does not serve simply as a rubber stamp that automatically places its imprimatur on the proposed settlement. Rather, the Court must make an independent judgment as to whether the proposed settlement is fair and reasonable." *U.S. v. Davis*, 11 F. Supp. 2d 183, 189 (D.R.I. 1998), aff'd 261 F.3d 1 (1st Cir. 2001) citing *Cannons*, 899 F.2d at 84. This inquiry is similar to the one used by courts when reviewing consent decrees generally. *See, e.g., U.S. v.*

Jones & Laughlin Steel Corp., 804 F.2d 348 (6th Cir. 1986) (consent decree must be fair, adequate, and reasonable, as well as consistent with the public interest); *Cemex Inc. v. Los Angeles County*, 166 Fed. Appx. 306 (9th Cir. 2006) (consent decree is reviewed to ensure that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned).

The Attorney General also invokes the CATA as a basis for extending contribution protection to Willow Brook for its non-CERCLA claims. *Memorandum in Support of Joint Motion to Enter* at 4 (Doc. No. 2038). However, while the Attorney General has invoked the CATA as a basis for the PCD's settlement terms, he has disregarded the fact that the CATA has its own procedural and substantive safeguards. Under the Act, "[w]hen a release, covenant not to sue, or a similar agreement is given in good faith to one of two or more persons liable in tort for the same injury," it "discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." OKLA. STAT. tit. 12, § 832(H)(2) (emphasis added). Accordingly, under the CATA, an inquiry into the circumstances surrounding the extension of contribution protection is appropriate if a settlement is challenged based on the statute's "good faith" requirement. *See, e.g., Dutsch v. Sea Ray Boats, Inc.*, 845 P.2d 187, 192 (Okla. 1992) (a hearing may be appropriate "to determine the good faith, or lack thereof, in a settlement"); *see also Sobik's Sandwich Shops, Inc. v. Davis*, 371 So.2d 709, 711 (Fla. App. 1979) (in order for "good faith" condition to have any meaning at all consistent with the underlying purposes of Florida's analogous Uniform Contribution Among Joint Tortfeasors Act, claimant must have reasonable, non-arbitrary basis for amount of settlement).

Because the Attorney General has failed to demonstrate any basis, reasonable or

otherwise, for the terms of the PCD, Willow Brook's release from liability cannot be said to be fair, reasonable, or to have been given "in good faith," and extending contribution protection under CERCLA or the CATA is therefore unjustified and prejudicial to the other Defendants. As detailed below, there is substantial evidence that the terms of the settlement between Willow Brook and the Attorney General, including the purported contribution protection, are neither fair, reasonable, nor agreed to in good faith.

b. The Attorney General has not Demonstrated that Willow Brook's Settlement Bears Any Relation to its Alleged Liability.

As the proponent of a consent decree brought under the aegis of CERCLA, the Attorney General bears the burden of producing evidence which enables the Court to determine independently whether the proposed consent decree is fair, reasonable, and consistent with the goals of CERCLA. *See U.S. v. Pesses,* No. Civ.A.No. 90-654, 1994 WL 741277, at *5 (W.D. Pa. Nov. 7 1994); *see also Davis,* 11 F. Supp. 2d at 189. The Attorney General has completely failed in this regard, as he has supplied no evidence whatsoever to support the terms of the PCD.

"Substantive fairness introduces into the equation concepts of corrective justice and accountability: a party should bear the costs of the harm for which it is legally responsible." *Cannon Engineering,* 899 F.2d at 87. This logic, in turn, dictates "that settlement terms must be based upon, and roughly correlate with, some acceptable measure of comparative fault, apportioning liability among the settling parties according rational (if necessarily imprecise) estimates of how much harm each PRP has done." *Id.* Additionally, because CERCLA may impose joint and several liability for response costs upon PRPs, another important consideration in the assessment of the fairness of a consent decree is the effect of the settlement on non-settlers. *Alliedsignal, Inc.*, 62 F. Supp. 2d 713, 719 (N.D.N.Y. 1999). *See also In re Tutu Water Wells CERCLA Litigation*, 326 F.3d 201, 207 (3d Cir. 2003) (measure of comparative fault on

which settlement terms are based must not be arbitrary, capricious, or devoid of a rational basis). As the *Cannons* court noted, there is no "universally correct approach" as to how comparative fault should be measured; however, the court observed that "[w]hatever formula or scheme EPA advances for measuring comparative fault and allocating liability should be upheld so long as the agency supplies a plausible explanation for it, welding some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling PRPs." *Cannons*, 899 F.2d at 87.

The problem with the PCD is that the Attorney General has provided no formula, no per unit basis, no scheme, no information whatsoever as to how the State arrived at a settlement figure of $45,781 in response costs for Willow Brook with respect to the IRW, or $28,906 for unspecified natural resources damages. Nor has the Attorney General explained how the sum of $28,906 recovered in natural resource damages is to be broken out by watershed – a matter of concern to Defendants, as they are entitled to a credit against their potential liability for any such settlement sums under both CERCLA § 113(f)(2) and the CATA, OKLA. STAT. tit. 12, §832(H)(1). Instead, the PCD simply recites an unsupported conclusion that the parties have "discussed and negotiated the extent of the claims of Plaintiff against Willow Brook for past and future environmental response costs," and that "[t]he settlement terms are reasonable, adequate and consistent with the purposes of CERCLA," *see Memorandum in Support of Joint Motion to Enter Consent Decree* at 3.

The Attorney General, no doubt, does not explain the relative liability of Willow Brook because it cannot. As Defendants have demonstrated in their recently-filed *Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6 and 10 Due to Lack of Defendant-Specific Causation* (Doc. No. 2069), Plaintiff lacks evidence to prove causation and damages with

respect to each of the Defendants. As Defendants have explained, all of Plaintiff's evidence of causation and injury is based on the aggregate alleged impact of the use of poultry litter in agriculture in the IRW by a wide array of operators and land owners, many of whom are not parties to the litigation; Plaintiff has not gathered evidence that any particular Defendant has caused any of the injuries alleged in the Second Amended Complaint, and has failed to apportion damages among the Defendants. *Id.* at 2-3. If Plaintiff is unable to make this correlation – as it has so far failed to do – it is impossible for the Court to assess the fairness of the settlement terms of the PCD. *See, e.g., Commissioner of Dept. of Planning and Natural Resources v. Century Alumina Co.*, Civil Nos. 2005/0062, 2007/114, 2008 WL 4693550, at *5-6 (D.V.I. Oct. 22, 2008) (unpublished) (court could not assess the fairness of a proposed consent decree where the movants had not provided numbers for total damages and natural resource damages, and had "suggested no apportionment methodology or presented even any imprecise estimates of the comparative fault of the various parties or groups of parties").

The Attorney General has provided no "plausible explanation" for its apportionment of liability to Willow Brook or the settlement figures contained within the PCD. *Cannons*, 899 F.2d at 87. Because the Court cannot begin to assess the comparative fault of Willow Brook or the adequacy of its settlement with the State based upon the information supplied by the Attorney General, the PCD cannot be construed as fair, and should be vacated.

c. The Attorney General has not Demonstrated the Adequacy of the Settlement with Willow Brook.

The reasonableness or adequacy of a consent decree may be determined by considering whether the terms of the settlement are roughly proportional to the PRP's responsibility and whether they serve the public interest. *U.S. v. Charter Int'l Oil Co.*, 83 F.3d 510, 521 (1st Cir. 1996). A court should look to see that the figures relied upon derive in a sensible way from a

plausible interpretation of the record. *Cannons*, 899 F.2d at 90.

In *United States v. Montrose Chemical Corporation*, 50 F.3d 741 (9th Cir. 1995), the United States Court of Appeals for the Ninth Circuit considered the reasonableness and fairness of a settlement in a CERCLA action where the district court had approved a consent decree which provided for a $45.7 million settlement between plaintiffs and approximately 150 defendants. A Special Master oversaw settlement negotiations, and ultimately presented the district court with a twelve-page report recommending approval of the consent decree. *Id.* at 745. Despite this detailed analysis, the Court of Appeals found that the consent decree could not be determined to be fair or reasonable, as the Special Master's report neglected to reference even preliminary government estimates of the potential total natural resource damages. With regard to this omission, the court observed that, notwithstanding the deference due by a reviewing court, "there is a fundamental difference in the review of the sufficiency of evidence to support a settlement and the situation where there is no evidence at all on an important point." *Id.* at 746-47. Without any information regarding the total projected damages, the court could not determine the proportion of those costs to be paid by the settling PRPs, or compare that figure with the proportion of liability attributable to them. *Id.* at 747. "'Fair' and 'reasonable' are, by their very nature, comparative terms," noted the court, and "[i]n such an informational vacuum, the fairness or reasonableness of a $45.7 million settlement simply cannot be measured." *Id.* Further noting that "[d]eference does not mean turning a blind eye to an empty record on a critical aspect of settlement evaluation," the Court of Appeals held that the district court had erred in approving the consent decree. *Id.* at 748.

By virtue of the Attorney General's failure to provide even an iota of support for the settlement figures, this Court was improperly forced to consider the PCD in just such an

"informational vacuum." It is impossible to determine whether Willow Brook's payment of $45,781 in response costs for the IRW is reasonable, because the State has provided the Court no information regarding overall damages or how $45,781 relates to Willow Brook's relative liability for the watershed. Further, as described in Section IV(b), the Attorney General does not even attempt to break out the natural resource damage figure of $28,906 by watershed, so that any attempt to evaluate that number is also futile. Nor does the Attorney General explain why the PCD purports to resolve claims dating from December 31, 1998. The date is of no discernible significance, and the Attorney General provides no information regarding the import of that date or its relation to the amount of money Willow Brook has agreed to pay or whether Willow Brook remains in this litigation for alleged pre-December 31, 1998 damages. From all appearances, the Attorney General has picked an arbitrary settlement figure, an equally arbitrary start date, and has never explained how either "derive[s] in a sensible way from a plausible interpretation of the record." *Cannons,* 899 F.2d at 90. Because the State has failed to demonstrate how Willow Brook's settlement is adequate in light of its responsibility for the alleged injury to the IRW, the PCD cannot be deemed reasonable, and should be vacated.

d. The Injunctive Relief Agreed to by Willow Brook in the PCD is Illusory and Meaningless.

In exchange for a release from liability with respect to every watershed in the State of Oklahoma, Willow Brook has agreed to a litany of restrictions which purport to govern its and its contract growers' use of poultry litter and compel compliance with certain monitoring and reporting requirements. The following conditions are illustrative:

- Willow Brook agrees that it will assume legal and financial responsibility for the proper management, storage, land application, and final disposition of poultry waste generated at any future poultry operations it owns or operates;

- Willow Brook agrees that any poultry waste it generates in the future will not be land applied within the boundaries of any watershed located in whole or in part in Oklahoma;

- Willow Brook agrees to provide the State with access to any future poultry operations for monitoring, sampling, contamination investigation, and records inspection; and

- Willow Brook agrees to make detailed reports to the State on an annual basis, identifying all poultry operations it owns or contracts with (including the bird capacity of each barn and the quantity of poultry waste generated), and specifying the storage methods used, the final disposition of all poultry waste generated (including the identity and address of any person to whom the waste is transferred), the location and acreage of the land application site, the volume removed from the poultry operation in wet or dry tons, the date of removal, and soil test results for the land application site and application rate.

PCD at 8-11. While these conditions appear to be an onerous and impressive assumption of responsibility, they are, in truth, a painless and hollow agreement for Willow Brook. As consideration for Willow Brook's part in the PCD they are purely illusory, for as Willow Brook has declared, it "has ceased all of its poultry operations and has no intention of resuming them." PCD at 4. Knowing that it would never again maintain poultry operations in Oklahoma, Willow Brook could promise the State "anything and everything" for future operations in Oklahoma without cost or consequence. These restrictive conditions are meaningless, and further demonstrate that the PCD is, by any measure, questionable and unfair.

e. The Payment Mechanism that the Attorney General Asks this Court to Order and Sanction in the PCD Violates Oklahoma's Public Finance Statutes Regarding the Collection of Monies by the Attorney General and CERCLA.

The PCD calls for all funds received by the State from Willow Brook to be placed in a trust account established by the Attorney General ("the Poultry Litigation Environmental Trust"), which will then be paid out to restore, replace, or acquire natural resources; to reimburse the State and its agencies for costs related to the IRW or the Grand Lake Watershed, or for the more

generalized "cleanup or removal of pollutants from the environment"; and to reimburse the State or its contract attorneys for expenses incurred or fees earned in this litigation. PCD at 9-10.

The Attorney General's method for collecting and managing funds in settlement of Willow Brook's claims raises serious questions under both Oklahoma public finance law and CERCLA. As just one example, under Oklahoma law any monies which the State may recover in this litigation are considered state revenues and must be deposited into the state treasury. OKLA. STAT. tit. 62, § 7.1.B (requiring that each state agency, offer or employee must "deposit in the agency clearing account . . . all monies of every kind, including, but not limited to: . . . 3. Income from . . . judgments . . . ."); *see also* OKLA. STAT. tit. 74, § 18b.A.11 (requiring Attorney General "to pay into the State Treasury, immediately upon its receipt, all monies received by the Attorney General belonging to the state"); *cf.* OKLA. STAT. tit. 74, § 19.A (expressly capping balance of funds in Evidence Fund available for Attorney General's use). Oklahoma's Constitution vests exclusive control over the state treasury in the Oklahoma Legislature, providing that "[n]o money shall ever be paid out of the treasury of this State, nor any of the funds under its management in pursuance of an appropriation by law." OKLA. CONST. art. V, § 55. By including in the PCD a provision directing the allocation of the Willow Brook settlement to specific uses, the Attorney General is attempting to avoid legal requirements concerning Willow Brook's payments. *See, e.g.,* Defendants' *Motion for Judgment as a Matter of Law in Light of Plaintiff's Constitutional Violations* (Doc. No. 1064) and *Reply* (Doc. No. 1113-1); *see also Defendants' Joint Motion for Partial Summary Judgment on Plaintiffs' Damages Claims Preempted or Displaced by CERCLA* (Doc. No. 2031).[4]

[4] Moreover, because the PCD provides for Willow Brook's payment of $16,189 for attorney's fees, it is violative of CERCLA and the statute's underlying policy of restoring natural resources. CERCLA restricts the collection of attorney's fees to limited circumstances, and makes no provision for attorney's fees with regard to the recovery of natural resource damages. *See* CERCLA § 107(f). In the PCD, however, the Attorney General would

Due to the impropriety of including this provision in the PCD, the Court must examine these issues thoroughly before approving the PCD.

V. CONCLUSION

As Defendants have demonstrated, both the substance of the PCD, and the procedure by which the Attorney General piloted that document through to approval by this Court, are in contravention of the law. Justice requires that the PCD be vacated, and that any future consent decree be approved only after the Court is satisfied that the settlement is fair, reasonable, adequate, and in the public interest.

Wherefore, for the foregoing reasons, the undersigned Defendants respectfully request that this Court:

1. vacate the PCD between the State of Oklahoma and Willow Brook entered on May 19, 2009;

2. enter an Order setting forth a process by which the Attorney General is required to comply with proper, required, and agreed to procedures relating to PCD, thereby providing Defendants and members of the public with the opportunity to adequately review, consider, and comment upon and/or object to the PCD so that the Attorney General and this Court can consider such comments and objections as part of the process of considering whether to enter the PCD, including setting a fairness hearing on the PCD to ensure that the State has complied with its statutory and contractual obligations concerning the PCD;

3. grant Defendants their attorney's fees and costs associated with this issue; and

4. grant Defendants such other relief as this Court deems just and proper under the circumstances.

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collect attorney's fees from Willow Brook without establishing the basis for such fees, and without demonstrating – because it has provided no evidence as to the adequacy of Willow Brook's settlement -- that the claimed attorney's fees were not improperly diverted from the natural resource damages the State claims for the IRW. The PCD also does not address or take into account the important teachings from the Tenth Circuit in *New Mexico v General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006).

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